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No. 90-769

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the CITY AND COUNTY OF SAN FRANCISCO, et al.,
Petitioners,

VS.

BOB GEARY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CITY OF SAN DIEGO AS AMICUS CURIAE ON BEHALF OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The interest of Amicus Curiae is set out in the Motion for Leave to File, *supra.*

THE QUESTION PRESENTED

Whether the California constitutional provision, Article II, Section 6(b) which prohibits political parties from endorsing, supporting, or opposing candidates for nonpartisan local office violates the First Amendment.

ARGUMENT

INTRODUCTION

In this case, an opportunity is afforded to resolve a conflict between competing rights guaranteed in Article IV, Section 4 of the United States Constitution (the Guarantee Clause) and the First Amendment.

The Guarantee Clause basically provides that each state shall have the right to structure its own form of self-government.

The constitutional conflict occurs when groups assert the right to engage in First Amendment activity, in the form of political endorsement, support or opposition of candidates, in the context of nonpartisan local elections.

The court below held that Article II, Section 6(b) of the California Constitution was violative of First Amendment rights in that it did not represent a compelling interest and was not narrowly tailored to achieve its purported objectives. The court, unfortunately, failed to correctly target the compelling interest served, that is the assurance of the nonpartisan character of local, judicial, and school offices.

A. The Purpose Of Article II, Section 6(b) Of The California Constitution Was To Affirm California's Policy That Political Parties Have No Role In Nonpartisan Elections.

Based upon its experience with political corruption in the early twentieth century, California has endeavored to structure its own form of self-government by maintaining a strong local government system which is free from political party influence.

In 1986, California voters reaffirmed their commitment to the nonpartisan nature of local and judicial offices by

expressly prohibiting political parties from endorsing, supporting, or opposing candidates for nonpartisan offices. The California Constitution was amended to read as follows:

> Article II, Section 6
>
> (a) all judicial, school, county and city offices shall be nonpartisan;
>
> (b) no political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office.

Article II, Section 6(b) has been characterized as "a law preventing disruption of the nonpartisan political sector from without in order to permit the selection of candidates in that sector to take place in accordance with nonpartisan principles." *Geary v. Renne,* 880 F.2d 1062, 1082 (9th Cir. 1989), reh'g granted en banc, 895 F.2d 1230 (9th Cir. 1990). Section 6(b) clearly demonstrates California voters' concern regarding the adverse effects of partisan politics on the quality and operation of local and judicial offices.

Though the court below believed that "[v]oters are free to accept or reject endorsements made on the basis of political beliefs," realistically, party endorsed candidates become the beneficiaries of party funds, and hence, the media attention and visibility political party money provides. *Geary v. Renne,* 911 F.2d 280, 287 (9th Cir. 1990) (Reinhardt, J., concurring). It is precisely this emphasis on party endorsement that California voters sought to avoid by means of amending the state constitution in 1986.

By approving the constitutional amendment in question, voters did not advocate the curtailment of political party activity in the partisan office arena. This issue was

fully addressed in *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214 (1989). In *Eu,* this Court held as violative of the First Amendment a California statute which regulated the traditional activities of political parties in partisan office primary elections. But that issue is separate and distinct from the voters' compelling concern regarding the potential impact of party endorsements on post-election performance of nonpartisan office holders.

Political parties and their numerous partisan activities such as conducting campaigns, nominating partisan office candidates who will espouse party held positions, and even structuring the party organization are statutorily regulated by California Elections Code sections 8000-9956. Regarding primary elections, a political party is qualified to participate if, (a) during the last preceding gubernatorial election one of its candidates received two percent (2%) of the entire vote of the state; (b) voters equal to at least one percent (1%) of the entire vote of the state declared their intention to affiliate with the party; or (c) a petition signed by ten percent (10%) of the voters declaring that they represent a named proposed party is filed with the Secretary of State. Cal. Elec. Code § 6430 (Deering Supp. 1990). These sections regulate traditional political party participation in primary elections by requiring a preliminary showing of a modicum level of support. The state's interest is to avoid confusion, deception and even frustration of the democratic process at the general election. *Libertarian Party v. Eu,* 28 Cal.3d 535, 546 (1980).

In *Austin v. Michigan Chamber of Commerce,* 110 S.Ct. 1391, (1990), this Court found valid a Michigan state law prohibiting corporations, which are statutorily regulated but enjoy special advantages as do political parties in

California, from using corporate treasury funds for independent expenditures in support of or opposition to any candidate in elections for state office. The Court held that "the state's decision to regulate only corporations was precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of legal advantages given to corporations." *Id.* at 1401. Similarly, political parties should not be allowed to manipulate the political process in the nonpartisan forum, and *only* in the nonpartisan forum, with their own "war chests." California voters, by Article II, Section 6(b), have not closed the marketplace of ideas and discussion that is part and parcel of the election process; rather, they sought to maintain the independence of the marketplace, freeing it from political overtones that have little, if anything, to do with local government services.

B. Maintaining The Nonpartisan Nature Of Local Government Remains A Distinct Priority In Communities Throughout California.

The City of San Diego, a charter city under the California Constitution, has been governed by its present charter since 1931. Like many California communities, San Diego has a long-standing tradition of nonpartisan local government. Even before Section 6(b) was added to Article II, the principle and practice of nonpartisanship thrived in San Diego.

From 1931 through November 1988, San Diego, whose city charter provides for a nine member City Council, including the mayor,[1] had a system of council nomination by district and election citywide. With the passage of Proposition E, amending Sections 10, 12, and 23 of The

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[1]San Diego City Charter sections 10, 12 (1931).

San Diego City Charter, that system changed to provide for direct district nomination and election. Proposition E was the result of community concern that council members be even more responsive and attuned to constituent needs. In a 1989 newspaper survey of 701 San Diegans, sixty-one percent (61%) of the registered voters polled stated they favored district nomination *and* election of City Council members. The reaction to district nomination and election of Council members overall was almost as high at fifty-seven percent (57%).[2]

A recognition of the increasing role San Diego's varied neighborhoods play in local government, as well as a belief that relatively unknown candidates with limited financial backing should be given an opportunity to succeed to office through grass-roots campaigns were at the heart of the Charter amendment.

Clearly, San Diegans hold the view that local government is primarily concerned with the delivery of government services, and that "there is no Democratic or Republican way to pave a street." Note, *Local Nonpartisan Elections, Political Parties and the First Amendment,* 87 Colum. L. Rev. 1677, 1679 (1987) (citing R. Mountjoy, Historical Perspective of Nonpartisan Elections) (position paper by Cal. Assembly member/on file at the Columbia Law Review.)

While political parties may frequently view local nonpartisan office as a training ground for candidates being groomed for higher partisan office, the community's interest is in its own welfare. If political parties are allowed to play a more dominant role in the nomination and election of local officeholders, we contend that the garnering of party support in the form of funding and identification

[2]Los Angeles Times, October 25, 1989 at A3.

could overshadow what should be a local candidate's primary focus, the community's welfare.

In the initial Ninth Circuit opinion, the court recognized that, "[t]he dominant effect [of Section 6(b)] is to open the process to more diverse interests, groups, and individuals, or to prevent the political process from becoming clogged and unworkable . . . " *Geary v. Renne,* 880 F.2d at 1065.

San Diegans, in uniting to amend their City Charter, aimed to eliminate political parties as intermediaries between citizens and local government. In amending their City Charter, San Diegans have further enhanced this community's long-standing nonpartisan tradition by taking the political process to the people, affording them the opportunity to nominate and elect representatives from their respective council districts without partisan endorsement.

CONCLUSION

Once partisan endorsements are permitted, the nonpartisan tradition of local elections will disappear. San Diego, as well as other California communities whose commitment to the principle and practice of nonpartisanship is long-standing, will be unable to protect the offices of local government from undue political influence.

For the reasons set forth herein, the petition for writ of certiorari should be granted.

DATED: December 5, 1990

Respectfully submitted,

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